No. 76-1654

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES BROWNSELL, ET UX., PETITIONERS

v.

ARCHIE DAVIDSON AND JOAN BOYD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

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Petitioners seek review of the dismissal of their complaint. That complaint alleged the same facts that had formed the basis for petitioner Charles Brownsell's earlier unfair labor practice claim against his employer, the United States Postal Service, which was settled by an agreement between the parties.

Petitioner Charles Brownsell[1] was an employee of the Postal Service in New City, New York (Pet. 4). Petitioner alleged that because of on-the-job injuries he became unable to perform the duties of his route full-time. He worked part-time until respondent Archie Davidson, the Postmaster of New City, directed him not to return until he could work

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[1]Petitioner Cazilie Brownsell is Charles Brownsell's wife (Pet. 4).

full-time (Pet. 4-5). Petitioner did not work between October 6, 1972, and September 29, 1975 (Pet. App. 1a). He filed two unfair labor practice charges with the National Labor Relations Board, claiming that the Postal Service had violated Section 8(a) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(a), by laying him off and by refusing or neglecting to process his claims with respect to his on-the-job injuries because of his activities on behalf of the National Association of Letter Carriers (Pet. 6).

On September 22, 1975, petitioner and the Postal Service entered into a settlement agreement regarding his unfair labor practice charges, pursuant to which he received, *inter alia*, $5,000 in back pay (Ct. App. 21a-26a).[2]

On October 2, 1975 (Ct. App. 2), 10 days after he entered into the settlement agreement, petitioner filed in state court a complaint sounding in tort, naming as defendants the two

[2]"Ct. App." refers to the brief and appendix filed in the court of appeals. A copy will be lodged with this Court. The other terms of this settlement agreement were as follows: It was agreed that the government would not offset the amounts petitioner had been paid as disability compensation (Ct. App. 22a). The Postal Service credited petitioner with 297 hours of annual leave and 148 hours of sick leave, representing 80% of the leave that petitioner would have accrued if he had worked between July 1, 1973, and September 22, 1975. The Postal Service agreed to apply certain hours of annual leave and sick leave to a debt petitioner owed the Postal Service, and to supply petitioner with written evidence that the debt had been satisfied. The Postal Service agreed to reinstate petitioner to his former route as a letter carrier, with the understanding that he was under a medical restriction and would not be required to lift items weighing in excess of 15 pounds or to perform duties necessitating excessive bending, that his duties did not require foot deliveries, and that he would perform on a 40-hour schedule at a level of "reasonably normal productivity" (Ct. App. 23a-24a). The reinstatement of petitioner would be without prejudice to his seniority and other rights and privileges. None of the above was to be an admission that the Postal Service or any of its officers or agents had violated the National Labor Relations Act (Ct. App. 24).

Postal Service employees whose actions gave rise to the claims petitioner had just settled (Ct. App. 6a-7a). The case was removed to the federal district court under 28 U.S.C. 1441(a) and 1442(a) (Ct. App. 2a-5a). The tort claim, like petitioner's unfair labor practice charges, was based on the alleged failure to process claim forms and wrongful separation from work because of petitioner's union activities (Ct. App. 8a-9a). In his tort suit petitioner sought damages for loss of salary and benefits, for legal services, and for mental injury, as well as punitive damages (Ct. App. 10a-12a). In addition, petitioner Cazilie Brownsell sought damages for mental injury and for embarrassment because of the loss of her husband's earnings and because of the public humiliation of receiving welfare payments (Ct. App. 12a-14a). The district court dismissed the complaint on the grounds that the allegations were essentially claims of unfair labor practices under Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), over which the National Labor Relations Board had exclusive jurisdiction (Pet. App. 1a-2a). The court of appeals summarily affirmed (Pet. App. 3a-4a).

1. This case does not merit review in this Court. The alleged wrongful acts were legally cognizable only as unfair labor practices. Petitioner's settlement of his unfair labor practice claims against the Postal Service on September 22, 1975, constitutes an absolute and complete defense to any action based on those claims. Cf. 28 U.S.C. 2672 (federal agency's settlement of tort claims against the United States constitutes complete release of any claim against the employee whose act gave rise to the claim, as well as any claim against the government); *Cox* v. *City of Freeman, Missouri*, 321 F. 2d 887 (C.A. 8).

2. Moreover, with limited exceptions not applicable here, the courts do not have jurisdiction over actions

asserting no wrongs other than unfair labor practices. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. Petitioners rely on *Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25*, No. 75-804, decided March 7, 1977, which holds that courts may in certain circumstances have concurrent jurisdiction with the National Labor Relations Board. In *Farmer*, however, this Court held that for such concurrent jurisdiction to arise it is essential that the state tort either be unrelated to employment discrimination or be based upon the particularly abusive manner in which the discrimination was accomplished or threatened; the tort may not be merely the actual or threatened discrimination itself (slip op. 14). The Court stressed that something more than the "considerable emotional distress and anxiety" that may occur in any unfair labor practice case is required to justify concurrent jurisdiction (*ibid.*).

Petitioners do not contend that the allegedly discriminatory acts forming the basis of their state tort complaint were committed in an especially abusive or outrageous manner. The complaint simply alleges that respondents failed to file petitioner's claims for on-the-job injuries and then laid him off because of his union activities, and that these actions were willful, malicious, and unlawful, and that their purpose was retaliation or punishment for petitioner's union activities.[3] These allegations also constituted the

[3]The actions complained of are that respondents (1) "failed, refused and neglected to process official claims forms relating to petitioner's on-the-job-injuries"; (2) "terminated [or] laid off" petitioner; and (3) "did deny * * * his application * * * to be reinstated to his former position" (Ct. App. 8a). The complaint alleges that these acts were "based upon and in retaliation for the exercise by [petitioner] of his representative capacities on behalf of [the union]" (Ct. App. 9a). Additionally, the complaint asserts that respondents' actions were "done willfully, maliciously, and without legal authority, and for the purpose of retaliation, punishment and to inflict injury * * * for his activities on behalf of [the union]" (Ct. App. 9a, 12a).

substance of petitioner's unfair labor practice claim. As this Court stated in *National Labor Relations Board* v. *Great Dane Trailers*, 388 U.S. 26, 33, "[t]he statutory language 'discrimination . . . to . . . discourage' [membership in a labor organization] means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose." Petitioners' allegations are a far cry from the "alleged campaign of harassment, public ridicule and verbal abuse" that this Court found to be sufficient to support concurrent jurisdiction in *Farmer* (slip op. 15).

The complaint demonstrates that this is nothing more than a typical unfair labor practice case (see note 3, *supra*). Therefore, under *Farmer*, the courts have no jurisdiction to consider petitioner's claims.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[4]The court of appeals had the opportunity to consider this case in light of *Farmer*. Petitioners described *Farmer* in their petition for rehearing, and observed that it had been argued in this Court. The petition for rehearing was denied on April 14, 1977, five weeks after the decision in *Farmer* (Pet. App. 8a).